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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/010,793  
Appellant(s) : Gerard Laurent Buisson, et al.  
Filed : November 13, 2001  
Title : SUBSTANTIALLY TRIANGULAR SHAPED OVER-CAP  
TC/A.U. : 3727  
Examiner : Robin Annette Hylton  
Conf. No. : 5852  
Docket No. : 8329M  
Customer No. : 27752

APPEAL BRIEF

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450  
Dear Sir,

This Brief is filed pursuant to the appeal from the U.S. Patent and Trademark Office decision dated April 19, 2004. A timely Notice of Appeal was filed on June 17, 2004.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

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#### STATUS OF CLAIMS

Claims 1-20 stand rejected. Claims 1-20 are appealed. A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

#### STATUS OF AMENDMENTS

No amendment was filed.

#### SUMMARY OF CLAIMED SUBJECT MATTER

The claimed subject matter is directed to a substantially triangular-shaped over-cap. The over-cap includes a body having a substantially triangular-shaped perimeter with three perimeter corners and three perimeter sides. The over-cap also includes a skirt including a skirt corner extending substantially downwardly from one of the perimeter corners. The skirt corner includes at least one inner extension extending toward an area adjacent the body. The total length of all of the inner extensions in combination is less than about 70 percent of the total length of the perimeter. (Specification page 2, lines 13-19).

In additional exemplary embodiments, the invention is directed to a substantially triangular-shaped over-cap with a body having a substantially triangular-shaped perimeter with three perimeter sides and first, second and third perimeter corners. The first perimeter corner is bisected by an imaginary line at a bisecting point, such that an imaginary boundary line extends perpendicular to the imaginary bisecting line and intersects the imaginary bisecting line at an intersection point. The intersection point is located from the bisecting point a distance of about 20 percent of a maximum width of the perimeter. The imaginary boundary line further intersects the perimeter at two locations to define a perimeter extension therebetween that includes at least a portion of the first perimeter corner. A skirt also extends substantially downwardly from the perimeter extension and includes at least one inner extension extending toward an area adjacent the body. The inner extension includes inner vertical cross-sectional profiles along its length, wherein, outside the perimeter extension, a portion of the perimeter is free of an inner extension having an inner vertical cross-sectional profile that is substantially the same as at least one of the inner vertical cross-sectional profiles within the perimeter extension. (Specification page 2, lines 20-33).

In further exemplary embodiments, a substantially triangular-shaped over-cap is provided with a body having a substantially triangular-shaped perimeter with three perimeter sides. The perimeter further includes a first perimeter corner bisected by a first imaginary line at a first bisecting point, the first imaginary line having a length extending from the first bisecting point to

a point of intersection with one of the perimeter sides. The perimeter also includes a second perimeter corner bisected by a second imaginary line at a second bisecting point, the second imaginary line having a length extending from the second bisecting point to a point of intersection with one of the perimeter sides, and a third perimeter corner bisected by a third imaginary line at a third bisecting point, the third imaginary line having a length extending from the third bisecting point to a point of intersection with one of the perimeter sides. A first imaginary boundary line extends perpendicular to the first imaginary bisecting line and intersects the first imaginary bisecting line at a first intersection point. A second imaginary boundary line extends perpendicular to the second imaginary bisecting line and intersects the second imaginary bisecting line at a second intersection point. A third imaginary boundary line extends perpendicular to the third imaginary bisecting line and intersects the third imaginary bisecting line at a third intersection point. The first intersection point is located from the first bisecting point a distance of about 20 percent of the length of the first imaginary line. The second intersection point is located from the second bisecting point a distance of about 20 percent of the length of the second imaginary line. In addition, the third intersection point is located from the third bisecting point a distance of about 20 percent of the length of the third imaginary line. The first imaginary boundary line intersects the perimeter at two locations to define a first perimeter extension therebetween that includes at least a portion of the first perimeter corner. Similarly, the second imaginary boundary line intersects the perimeter at two locations to define a second perimeter extension therebetween that includes at least a portion of the second perimeter corner. The third imaginary boundary line further intersects the perimeter at two locations to define a third perimeter extension therebetween that includes at least a portion of the third perimeter corner. A skirt includes a first skirt portion extending substantially downwardly from the first perimeter extension, a second skirt portion extending substantially downwardly from the second perimeter extension, a third skirt portion extending substantially downwardly from the third perimeter extension. The first skirt portion includes at least one inner extension extending toward an area adjacent the body. The inner extension includes inner vertical cross-sectional profiles along its length, wherein, outside the first, second, and third perimeter extensions, the perimeter is free of an inner extension having an inner vertical cross-sectional profile that is substantially the same as at least one of the inner vertical cross-section profiles within the first perimeter extension. (Specification page 3, lines 1-34).

The substantially triangular-shaped over-cap according to the present invention is advantageous in that it provides a locking mechanism that maintains the over-cap's position on a similarly shaped container, even when a pressure differential arises between the inner and outer

sides of the container. In addition, the over-cap may be easily removed from the container by a consumer. These and additional advantages of the over-cap according to the invention will be more apparent in view of the following detailed description. (Specification page 4, lines 1-6).

#### GROUND OF REJECTION TO BE REVIEWED ON APPEAL

- I. Whether the Examiner's failure to provide an affidavit corroborating personal knowledge used by the Examiner during prosecution is proper?
- II. Whether the rejection of Claims 1-9 and 12-20 under 35 U.S.C. § 103(a) as being unpatentable over Michaud, et al. (U.S. Patent No. 4,742,934) is proper?
- III. Whether the rejection of Claims 10 and 11 under 35 U.S.C. § 103(a) as being unpatentable over Michaud, et al. (U.S. Patent No. 4,742,934) in view of Blanchard (U.S. Patent No. 4,026,459) is proper?

#### ARGUMENTS

- I. Whether the Examiner's failure to provide an affidavit corroborating personal knowledge used by the Examiner during prosecution is proper?**

Appellants respectfully assert that the Examiner's assertions have their basis in the Examiner's personal knowledge. Appellants have addressed this issue prior to this Brief, but to no avail. Appellants disagree with the Examiner's use of her own personal knowledge and now assert that since Appellants' request for an affidavit attesting to the Examiner's personal knowledge has gone unmet, the Examiner's rejections as to Claims 1-20 should be removed and the claims allowed to issue.

In the Examiner's office actions to Appellants dated November 28, 2003, Appellants respectfully contend that the Examiner made several mistakes. First, the Examiner did not properly respond to Appellants' previous request for an affidavit made in Appellants' response dated September 4, 2003 based upon the Examiner's use of her personal knowledge to reject Appellants' claims.

In the above-noted office action, the Examiner states that "an affidavit is not necessary [because] [i]t can be seen in figure 2 of Michaud that the detents 52 each extend less than 70% of the perimeter of the over-cap." However, the Examiner does not point to the measure by which one may "see" that the detents of Michaud '934 are less than 70% of the perimeter of Michaud's lid; e.g., by some form of calculation or eye-ball observation. Furthermore, the Examiner does not point to a teaching in Michaud '934 that would motivate one of skill in the art to provide Appellants' element of "less than 70%" nor does the Examiner provide the resource(s) for her extemporaneous measurement. Appellants are not disposed to rely upon the Examiner's sight "to

see” that the detents of Michaud ‘934 are less than 70% of the perimeter of the overcap and consider the Examiner’s unspoken methodology at seeing such to be well within the personal knowledge of the Examiner. Thus, Appellants’ still consider the Examiner’s measurement, which has not been validated by a separate reference, to be within her personal knowledge and Appellants therefore, again, request an affidavit that validates the Examiner’s assertions.

If Appellants traverse an assertion made by the Examiner, the Examiner should cite a reference in support of her position.<sup>1</sup> When a rejection is based on facts within the personal knowledge of the Examiner, the data should be stated as specifically as possible, and the facts must be supported, when called for by the Appellant, by an affidavit from the Examiner.<sup>2</sup> If the Examiner fails to provide a suitable affidavit that bolsters her reasons for rejection herein, the rejection should be withdrawn.

Given this, the Examiner should have withdrawn her rejections, at least, as to all of the claims affected by Appellants’ second contention noted above (namely, Claims 16-20). If an affidavit validating the Examiner’s use of her personal knowledge is not provided, the rejection as to the affected claims should be withdrawn.

As noted above, the Examiner’s measurements come from her personal knowledge because she has made them without any corroborating text or resource. Furthermore, according to current legal precedent, such ‘eye-ball’ measurements, as taken from figures in a utility patent, are themselves improper. It is well established in the law that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.<sup>3</sup> [Emphasis added.] Again, it is well known that Patent Office drawings are not normally drawn to scale, with the dimensions and sizes of parts shown to exact measurements as are shop drawings.<sup>4</sup> When the reference does not disclose that the drawings are to scale and is silent as to dimensions, arguments based on measurement of the drawing features are of little value.<sup>5</sup>

The specification of Michaud ‘934 does not indicate that its figures are drawn to scale and thus serve as little value to determine their dimensions, especially in comparison to Appellants’ claimed dimensions.

Thus, given that 1) the Examiner used her personal knowledge to reject Appellants’ Claims 1-20 without corroborating such through an affidavit as properly requested by Appellants

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<sup>1</sup> 37 CFR § 104(d)(2); MPEP 2144.03.

<sup>2</sup> Id.

<sup>3</sup> In re Wright, 569 F.2d 1124, 1127, 193 U.S.P.Q. (BNA) 332, 335 (CCPA 1977).

<sup>4</sup> In re Olson, 212 F.2d 590, 101 U.S.P.Q. (BNA) 401 (CCPA 1954).

and 2) the Examiner's use of the figures of Michaud '934 to make measurements and comparisons to Appellants' claims therefore is legally improper, Appellants respectfully request that the Examiner's rejection of Claims 1-20 under 35 U.S.C. § 103(a) as unpatentable over Michaud '934 (and in combination with Blanchard '459) be rescinded.

**II. Whether the rejection of Claims 1-9 and 12-20 under 35 U.S.C. § 103(a) as being unpatentable over Michaud, et al. (U.S. Patent No. 4,742,934) is proper?**

Claims 1-9 and 12-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Michaud, et al. (U.S. Patent No. 4,742,934--hereinafter, Michaud '934).

The Examiner states that Michaud '934 teaches the claimed over-cap except for the specific length of at least one inner extension about the perimeter of the over-cap and an intersection of points bounding the at last one extension formed by imaginary lines. The Examiner further states that Michaud '934 teaches that the (tray and) lid have triangular configuration. (See column 3, lines 57-59 of Michaud '934).

The Examiner states that it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the inner extensions less than about 70% of the perimeter of the over-cap (Claims 1-9 and 12-15), since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. The Examiner also asserts that it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the inner extensions at a distance bounded by intersecting points 20% along two intersecting imaginary lines of the over-cap (Claims 16-20).

*Claims 1-9 and 12-15*

Appellants respectfully disagree that Michaud '934 teaches or suggests Appellants' over-cap as claimed. First, Appellants' Claim 1 provides that the skirt attached to the over-cap extends substantially continuously about the perimeter of the over-cap. In contrast, Michaud '934 teaches away from this substantially continuous extension when it states that "lid segment 38 loosely overlies both outer wall 28 and sealing lip 30 of tray segment 20 except in corner areas A or the various points of intersection of the sidewalls of container lid 12 and container tray 10."<sup>6</sup> [Emphasis added.] By this admission, Michaud '934 clearly indicates that it does not provide a substantially continuously over-cap and specifically excludes this possibility. Furthermore, the

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<sup>5</sup> Hockerson-Halberstadt, Inc. v. Avia Group Int'l, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000).

<sup>6</sup> Michaud, et al. (U.S. Patent No. 4,742,934): col. 4, lines 62-66.

Examiner herself has admitted on the record that “the skirt is not uniformly continuous”.<sup>7</sup> Appellants assert that since the lid is not uniformly continuous, as is taught by Michaud ‘934 and admitted to by the Examiner, it cannot therefore be substantially continuous which is claimed by Appellants.

Appellants also respectfully assert that Michaud ‘934 fails to teach or suggest that at least one inner extension of Appellants’ over-cap is less than about 70% of the length of the perimeter. At first, the Examiner states that this element is merely an “optimum value” that is an obvious matter of choice for one of skill in the art. Next, however, the Examiner asserts that Figure 2 of Michaud ‘934 provides this element as determined by the Examiner’s own eye-ball review. By such statement, the Examiner seems to assert that Michaud ‘934 does in fact suggest the above element. Appellants point out that Michaud ‘934 neither teaches nor suggests Appellants’ above-noted element and that also, the Examiner’s measurement of such using Figure 2 of Michaud ‘934 is improper for all of the reasons stated hereinabove in the Section I.

Therefore, since Michaud ‘934 teaches away from Appellants’ substantially continuous skirt and the use of Michaud’s Figure 2 to make measurements and then compare them to Appellants’ claims is improper, Appellants respectfully request reconsideration and allowance of Claims 1-9 and 12-20 over the Examiner’s 35 U.S.C. § 103(a) rejection.

#### *Claim 7*

With regard to Claim 7, Appellants note that it depends upon Independent Claim 1 and thus should be held allowable over Michaud ‘934 since Claim 1, itself, is novel and nonobvious over Michaud ‘934.

#### *Claims 16-20*

The Examiner asserts that where the claim limitations of imaginary lines can be drawn in an infinite number of locations on the over-cap, it would have been obvious to one having ordinary skill in the art at the time the invention was made to use any combination of imaginary lines to provide an over-cap having the desired dimensions. Thus, the Examiner further asserts, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the inner extensions at a distance bounded by intersecting points 20% along two intersecting imaginary lines of the over-cap.

Appellants respectfully disagree with the Examiner’s assertions. First, as the Examiner readily notes, there are an infinite set of combinations of imaginary lines possible to provide an

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<sup>7</sup> Examiner’s Office Action, dated November 28, 2003, page 3.

over-cap of suitable dimensions. Appellants assert that since such a number is infinite, there must be some suggestion or motivation within Michaud '934 to produce Appellants' imaginary lines suitable to Appellants' dimensions. Without such teaching or motivation, either in Michaud '934 itself or in knowledge available to one of skill in the art, one of skill in the art could not hope derive Appellants' specific use of imaginary lines corresponding to Appellants' dimensions in their over-cap.

Furthermore, Appellants assert that Michaud '934 does not teach or suggest Appellants' inner extensions at a distance bounded by intersecting points 20% along two intersecting imaginary lines of the over-cap. There is no discussion of this element in Michaud '934 nor suggestion thereof. In fact, Michaud '934 does not suggest or discuss the use of imaginary lines to arrive at Appellants' dimensions at all. As such, Michaud '934 is not a suitable reference on which to assert Appellants' claims as obvious.

Appellants therefore request reconsideration and allowance of Claims 16-20 over the Examiner's 35 U.S.C. § 103(a) as being unpatentable over Michaud '934.

**III. Whether the rejection of Claims 10 and 11 under 35 U.S.C. § 103(a) as being unpatentable over Michaud, et al. (U.S. Patent No. 4,742,934) in view of Blanchard (U.S. Patent No. 4,026,459) is proper?**

Claims 10 and 11 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Michaud '934 in view of Blanchard (U.S. Patent No. 4,026,459).

Appellants respectfully disagree that Michaud '934 in view of Blanchard '459 teaches Appellants' invention. As mentioned above, it is Appellants' contention that 1) the Examiner's use of un-verified personal knowledge is fatal, 2) Michaud '934 teaches away from Appellants' claims such that is combination with another reference, i.e., Blanchard '459, is not curative.

In view of the reasons set forth above, Appellants contend that the combination of Michaud '934 in view of Blanchard '459 does not meet Appellants' invention both because the combination teaches away from Appellants' invention and also because Appellants believe that the Examiner has relied on un-verified personal knowledge to make her assertions. Therefore, Appellants respectfully request reconsideration and allowance of Claims 10 and 11 over the Examiner's 35 U.S.C. § 103(a) rejection.



SUMMARY

For the reasons set forth above, Appellants submit that the Examiner has not set forth the proper evidence for the 35 U.S.C. § 103(a) rejections. Accordingly, reversal of the Examiner's findings of unpatentability is respectfully requested.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY



Signature

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**Date:** November 19, 2004

**Customer No. 27752**

(AppealBrief.doc)  
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## CLAIMS APPENDIX

1. (Previously Presented) A substantially triangular-shaped over-cap, comprising:
  - a) a body having a substantially triangular-shaped perimeter with three perimeter corners and three perimeter sides, the body further having an area; and
  - b) a skirt extending substantially continuously about the substantially triangular shaped perimeter, the perimeter having a length, the skirt including a skirt corner extending substantially downwardly from one of the perimeter corners, the skirt corner including at least one inner extension having a length and extending toward the area adjacent to the body, wherein the length of the at least one inner extensions is less than about 70 percent of the length of the perimeter.
2. (Original) The substantially triangular-shaped over-cap of claim 1, wherein each inner extension has substantially the same inner vertical cross-section profile throughout its length.
3. (Original) The substantially triangular-shaped over-cap of claim 1, wherein the skirt includes at least one skirt side with a portion free of an inner extension having an inner vertical cross-section profile along its length that is substantially the same as an inner vertical cross-section profile of the inner extension of the skirt corner along its length.
4. (Original) The substantially triangular-shaped over-cap of claim 3, wherein at least one skirt side has a portion free of any inner extension.
5. (Original) The substantially triangular-shaped over-cap of claim 3, wherein at least one skirt side includes a portion of the skirt corner inner extension.
6. (Original) The substantially triangular-shaped over-cap of claim 1, wherein the skirt corner includes a single inner extension.
7. (Original) The substantially triangular-shaped over-cap of claim 1, wherein the skirt corner includes a plurality of inner extensions.
8. (Original) The substantially triangular-shaped over-cap of claim 7, wherein at least two inner extensions of the plurality of inner extensions each have a length, wherein the lengths are substantially equal to one another.
9. (Original) The substantially triangular-shaped over-cap of claim 1, wherein the skirt includes a flange at a lower edge.
10. (Original) The substantially triangular-shaped over-cap of claim 9, wherein the flange comprises an upper portion extending outwardly from the lower edge and a lower portion extending downwardly from the lower edge.

11. (Original) The substantially triangular-shaped over-cap of claim 9, wherein the flange comprises a tab.
12. (Original) The substantially triangular-shaped over-cap of claim 1, wherein the body has a top surface including a substantially triangular-shaped protrusion.
13. (Original) The substantially triangular-shaped over-cap of claim 12, wherein the protrusion is arranged adjacent the perimeter of the body.
14. (Original) The substantially triangular-shaped over-cap of claim 1, wherein the inner extension is substantially V-shaped in vertical cross-section.
15. (Original) The substantially triangular-shaped over-cap of claim 1, wherein the over-cap has a substantially equilateral triangular shape.
16. (Original) A substantially triangular-shaped over-cap, comprising:
  - a) a body having a substantially triangular-shaped perimeter with three perimeter sides and first, second and third perimeter corners, wherein the first perimeter corner is bisected by an imaginary line at a bisecting point, such that
    - (i) an imaginary boundary line extends perpendicular to the imaginary bisecting line and intersects the imaginary bisecting line at an intersection point,
    - (ii) the intersection point is located from the bisecting point a distance of about 20 percent of a maximum width of the perimeter, and
    - (iii) the imaginary boundary line further intersects the perimeter at two locations to define a perimeter extension therebetween that includes at least a portion of the first perimeter corner; and
  - b) a skirt extending substantially downwardly from the perimeter extension, the skirt including at least one inner extension extending toward an area adjacent the body, the inner extension including inner vertical cross-sectional profiles along its length, wherein, outside the perimeter extension, a portion of the perimeter is free of an inner extension having an inner vertical cross-sectional profile that is substantially the same as at least one of the inner vertical cross-sectional profiles within the perimeter extension.
17. (Original) The substantially triangular-shaped over-cap of claim 16, wherein, outside the perimeter extension, a portion of the perimeter is free of any inner extension
18. (Original) A substantially triangular-shaped over-cap, comprising:
  - a) a body having a substantially triangular-shaped perimeter with three perimeter sides, a first perimeter corner bisected by a first imaginary line at a first bisecting point, the first imaginary line having a length extending from the first bisecting point to a point of intersection with one of the perimeter sides, a second perimeter corner bisected by a

second imaginary line at a second bisecting point, the second imaginary line having a length extending from the second bisecting point to a point of intersection with one of the perimeter sides, and a third perimeter corner bisected by a third imaginary line at a third bisecting point, the third imaginary line having a length extending from the third bisecting point to a point of intersection with one of the perimeter sides, wherein

(i) a first imaginary boundary line extends perpendicular to the first imaginary bisecting line and intersects the first imaginary bisecting line at a first intersection point, a second imaginary boundary line extends perpendicular to the second imaginary bisecting line and intersects the second imaginary bisecting line at a second intersection point, and a third imaginary boundary line extends perpendicular to the third imaginary bisecting line and intersects the third imaginary bisecting line at a third intersection point,

(ii) the first intersection point is located from the first bisecting point a distance of about 20 percent of the length of the first imaginary line, the second intersection point is located from the second bisecting point a distance of about 20 percent of the length of the second imaginary line, and the third intersection point is located from the third bisecting point a distance of about 20 percent of the length of the third imaginary line, and

(iii) the first imaginary boundary line intersects the perimeter at two locations to define a first perimeter extension therebetween that includes at least a portion of the first perimeter corner, the second imaginary boundary line intersects the perimeter at two locations to define a second perimeter extension therebetween that includes at least a portion of the second perimeter corner, and the third imaginary boundary line further intersects the perimeter at two locations to define a third perimeter extension therebetween that includes at least a portion of the third perimeter corner; and

b) a skirt including a first skirt portion extending substantially downwardly from the first perimeter extension, a second skirt portion extending substantially downwardly from the second perimeter extension, a third skirt portion extending substantially downwardly from the third perimeter extension, the first skirt portion including at least one inner extension extending toward an area adjacent the body, the inner extension including inner vertical cross-sectional profiles along its length, wherein, outside the first, second, and third perimeter extensions, the perimeter is free of an inner extension having an inner

vertical cross-sectional profile that is substantially the same as at least one of the inner vertical cross-section profiles within the first perimeter extension.

19. (Original) The substantially triangular-shaped over-cap of claim 18, wherein the second skirt portion includes at least one second inner extension extending toward the area adjacent the body, the second inner extension includes second inner vertical cross-sectional profiles along its length, the third skirt portion includes at least one third inner extension extending toward the area adjacent the body, the third inner extension includes third inner vertical cross-sectional profiles along its length, wherein, outside the first, second, and third perimeter extensions, the perimeter is free of an inner extension having an inner vertical cross-section profile that is substantially the same as at least one of the inner vertical cross-section profiles within the second and third perimeter extensions.
20. (Original) The substantially triangular-shaped over-cap of claim 18, wherein, outside the first, second, and third perimeter extensions, the perimeter has a portion that is free of any inner extension.